A

HEN v. HIN

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[DIVORCE PETITION NO: WA-33JP-586-04-2017]
30 OCTOBER 2023

B

Abstract – *Even though a consent order cannot, generally, be altered without the mutual consent of the affected parties, in matrimonial cases, the court retains the discretion to vary a consent order under specific circumstances. The court, pursuant to ss. 83, 96 and 97 of the Law Reform (Marriage and Divorce) Act 1976, is empowered to vary orders pertaining to child custody or spousal and child maintenance if there is material change in circumstances.*

C

D

FAMILY LAW: *Children – Custody – Application to vary terms of decree nisi – Decree nisi granted husband reasonable access to children – Allegation by husband that he had been denied access to children by wife – Wife allegedly agreed for payment of child maintenance to cease on condition that husband forfeits access to children – Whether consent order subject to variation – Whether there was material change in circumstances for court to vary consent order – Law Reform (Marriage and Divorce) Act 1976, ss. 83, 96 & 97*

E

FAMILY LAW: *Children – Maintenance – Application to vary terms of decree nisi – Decree nisi ordered husband to provide monthly maintenance for children – Allegation by husband that he had been denied access to children by wife – Wife allegedly agreed for payment of child maintenance to cease on condition that husband forfeits access to children – Whether consent order subject to variation – Whether there was material change in circumstances for court to vary consent order – Law Reform (Marriage and Divorce) Act 1976, ss. 83, 96 & 97*

F

A *decree nisi* was issued in 2017 where (i) the petitioner wife was awarded the custody of the two children; and (ii) the petitioner husband was (a) granted reasonable access to the children; and (b) ordered to provide monthly child maintenance in the amount of RM3,000. The petitioner husband, through the present application, sought to vary certain terms of the *decree nisi* on the grounds that: (i) he had been denied access to the children by the petitioner wife since 2017; and (ii) the petitioner wife had previously agreed for the payment of child maintenance to cease on condition that the petitioner husband forfeits his access to the children. The primary issues that arose for determination were: (i) whether a consent order was subject to variation; and (ii) whether the petitioner husband had established material change in circumstances.

G

H

I

Held (allowing application in part; terms of petitioner husband's access to children varied from 'reasonable access' to more specific terms):

(1) While the general principle is that a consent order cannot be altered without the mutual consent of the affected parties, the landscape differs significantly when it comes to matrimonial matters. In matrimonial cases, the court retains the discretion to vary a consent order under specific circumstances that necessitate the court's intervention. Sections 83, 96 and 97 of the Law Reform (Marriage and Divorce) Act 1976 ('Act') specifically empower the court to vary any order related to child custody or spousal and child maintenance if there is material change in circumstances. (paras 17 & 18)

(2) In examining the question of material change in circumstances, the inquiry is not simply whether there has been any material change *per se* since the *decree nisi*; the change must be sufficiently material, such that expecting the *status quo* to remain would not be justified. The petitioner wife had, in no uncertain terms, violated the fundamental rights of the children by denying the petitioner husband's access to their children. Her conduct was inexcusable as she had, for over six long years, manipulated and weaponised the children to her advantage, denying the petitioner husband access to them. The petitioner wife's conduct, therefore, amounted to material change in circumstances. However, the petitioner husband's argument regarding the variation of the terms pertaining to child maintenance was untenable. The petitioner husband was attempting to evade his maintenance obligations by exploiting the messages exchanged with the petitioner wife. It was clear that the petitioner wife's willingness to forgo child maintenance was contingent upon the petitioner husband relinquishing his right of access to the children. Nonetheless, the petitioner husband was endeavouring to evade his responsibility to provide child maintenance payments while simultaneously insisting on his right to have access to the children. The prayer to vary the terms of maintenance was not allowed. (paras 22, 24, 35, 39 & 42)

Obiter:

(1) Access to a child should never, under any circumstances, be tied to the payment of child maintenance. While both parents have a responsibility to financially support their children, access to a child is a fundamental right that must never be employed as a bargaining chip or leverage in any situation. Access should unequivocally be recognised as an inherent right belonging to the child, rather than a privilege granted to the parent. (paras 32 & 35)

Case(s) referred to:
Anna Tay Siew Hong v. Joseph Ng Tiong Yong [1995] 3 CLJ 717 HC ***(refd)***
APE v. APF [2015] SGHC 17 ***(refd)***
Chow Sook Pheng v. Wong Maun Hoong [2011] 1 LNS 260 HC ***(refd)***
Geh Thuan Hooi v. Serene Lim Paik Yan [2009] 1 LNS 1682 HC ***(refd)***
Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 SC ***(refd)***
Kumpulan Protection Sdn Bhd v. Global Globe (M) Sdn Bhd [2016] 7 CLJ 733 HC ***(refd)***
Lim Hong Bee v. Mah Teck Oon [2010] 8 CLJ 473 HC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Navarajan Subramaniam v. Rajeswary Muniandy [2019] 1 LNS 1014 HC ***(refd)***
Ng Say Chuan v. Lim Szu Ling [2010] 10 CLJ 371 HC ***(refd)***
Re Coles And Ravenshear [1907] 1 KB 1 ***(refd)***
Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***
Reebok (M) Sdn Bhd v. CIMB Bank Bhd [2019] 9 CLJ 230 CA ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2006] 5 CLJ 318 HC ***(refd)***
United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***
YCC v. LSY [2007] 7 CLJ 207 HC ***(refd)***
Yeoh Ken Lee, Kelvin v. Liew Chooi Hoong [2005] 5 CLJ 408 HC ***(refd)***
Zainuddin Muhammad v. Atsco Ltd & Anor [2001] 4 CLJ 141 CA ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 96, 97

Other source(s) referred to:
Claire, Sturge and Danya Glaser, *Contact and Domestic Violence – The Experts' Court Report* [2000] Fam Law 615

For the petitioner husband - Kuah Jiun Yu; M/s Yew & Partners
For the petitioner wife - Goh Hui Hui; M/s Kelvin Wong, Phang & Assocs

Reported by Najib Tamby

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was an application ("this application") by the petitioner husband in encl. 23, seeking to vary certain terms of the *decree nisi* dated 17 May 2017 ("the *decree nisi*").

[2] In the interest of the privacy of the parties concerned, and the sensitivity of the issues in these proceedings, the petitioner husband, petitioner wife, and their two children have been anonymised in this judgment as HEN, HIN, MEY, and TEL, respectively.

The Factual Background

[3] In accordance with the *decree nisi*, custody of the two children ("the children") of the marriage was awarded to the petitioner wife. Simultaneously, the petitioner husband was granted reasonable access to the children. Additionally, the petitioner husband was obligated to provide monthly child maintenance in the amount of RM3,000.

[4] The petitioner husband filed this application in February 2023, seeking a variation of the *decree nisi* relating to the terms governing access to the children and child maintenance. This application was rooted in the following grounds: firstly, the petitioner husband asserted that he had been denied access to the children by the petitioner wife since 2017. Secondly, he contended that the petitioner wife had previously agreed for payment of child maintenance to cease on condition that the petitioner husband forfeit his access to the children.

[5] I allowed this application only to the extent of varying and specifying the terms of access, for the following reasons.

Issues

[6] The following issues were considered by this court:

(i) whether the petitioner husband should be allowed to rely on his affidavit in support which was affirmed pursuant to an earlier application that was withdrawn;

(ii) whether a consent order was subject to variation; and

(iii) whether the petitioner husband had established material change in circumstances.

Contentions, Evaluation, And Findings

Whether Petitioner Husband Should Be Allowed To Rely On His Affidavit In Support

[7] The petitioner wife raised a preliminary objection regarding the affidavit relied upon by the petitioner husband, which was affirmed on 20 October 2022 ("the October 2022 affidavit"). The petitioner wife's argument centred on the fact that the October 2022 affidavit was initially affirmed pursuant to an earlier and similar application in encl. 12 that was filed by the petitioner husband in October 2022. That earlier application was withdrawn in February 2023.

[8] Consequently, the petitioner wife contended that the petitioner husband should not be permitted to rely on the October 2022 affidavit as his notis niat mengguna-pakai afidavit was filed only in April 2023, after the October 2022 affidavit was refiled in February 2023 in support of this application. She asserted, therefore, that the petitioner husband should have filed a fresh affidavit in support of this application.

[9] Although the petitioner wife was technically correct regarding the October 2022 affidavit, it was unequivocal that she had not suffered any prejudice as a result of this oversight. It was crucial to emphasise that even though the affidavit was originally affirmed in October 2022, it was refiled in February 2023 to support this application. Notably, the petitioner wife had also responded to the October 2022 affidavit, which was a clear indication that she was not prejudiced.

[10] At this point, it was pertinent to reiterate the well-established legal principle that courts are inclined to afford parties the opportunity to rectify procedural matters, and address the substantive merits of a case, rather than permitting technicalities to obstruct the delivery of substantive justice, particularly when no prejudice is inflicted upon the opposing party. This jurisprudential trend is discernible in numerous precedents, including cases such as *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296; *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248; and *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31.

[11] Considering the principle that the "relation of the rules of practice to the work of justice is intended to be that of handmaid rather than a mistress", as articulated by Lord Collins MR in *Re Coles And Ravenshear* [1907] 1 KB 1, there was no justification in the present case for raising technicalities that had no bearing to the substance of this application.

[12] Moreover, it had been aptly stated by Hamid Sultan Abu Backer JCA in *Reebok (M) Sdn Bhd v. CIMB Bank Bhd* [2019] 9 CLJ 230 that "procedural skirmishes ought not to prevail, to defeat substantive justice".

[13] I also found valuable guidance in the case of *Kumpulan Protection Sdn Bhd v. Global Globe (M) Sdn Bhd* [2016] 7 CLJ 733, in which the court similarly held that an error in the intitulement would not prove fatal to an application if the complaining party was not prejudiced by it.

[14] It was also my observation that the petitioner wife had made significant efforts to obstruct the progress of this application, by pointing out that the petitioner husband had failed to settle the costs ordered in connection with the withdrawal of his previous application. Consequently, the scheduled hearing date for this application was adjourned from 26 June 2023 to 20 July 2023.

[15] Since I was disinclined to allow procedural skirmishes to obstruct the pursuit of substantive justice, I dismissed the petitioner wife's objection pertaining to procedural defect concerning the October 2022 affidavit, and proceeded to examine the merits of this application.

Whether A Consent Order Was Subject To Variation

[16] The petitioner wife further submitted that since the *decree nisi* was based on a consent order, and hence, not subject to variation.

[17] I had to disagree with the petitioner wife on this particular point. While the general principle, as established in the case of *Zainuddin Muhammad v. Atsco Ltd & Anor* [2001] 4 CLJ 141; [2003] 2 AMR 43; [2003] 1 MLJ 369, is that a consent order cannot be altered without the mutual consent of the affected parties, it was essential to note that the landscape differs significantly when it comes to matrimonial matters.

[18] In matrimonial cases, the court retains the discretion to vary a consent order under specific circumstances that necessitate the court's intervention. This legal principle has been elaborated upon in numerous cases, one notable example being *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371. The Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act") in ss. 83, 96, and 97, specifically empowers the court to vary any order related to child custody or spousal and child maintenance if there is material change in circumstances. This approach aligns with the High Court's stance in the case of *Yeoh Ken Lee, Kelvin v. Liew Chooi Hoong* [2005] 5 CLJ 408, where it was articulated by Faiza Thamby Chik J in the following passage:

> There is no question of either party being estopped from varying an order made by consent, if the application to vary is made under either s. 83 or 96 of the Act (*ie*, to vary orders for custody or maintenance), as the law gives the court power to vary such orders in the circumstances set out in those sections. The power is not limited to non-consensual orders. *Indeed, if consent orders may not be varied even if these are for custody or maintenance, then the primary principle of the welfare of the children would have to be disregarded in favour of a perceived notion that parties are bound by consent orders, no matter what the consequences even when there is a material change in circumstances. That cannot be the law*. In the ordinary case, there has to be finality. That is so even in orders for division of matrimonial assets, where there is no provision for applications to vary. There is, however, a provision to vary orders for custody and/or maintenance and that power ought to be exercised where ss. 83 and/or 96 apply, so as to preserve the *parens patriae* position of the court in relation to all children within the jurisdiction. I, therefore conclude that as custody and maintenance orders may be varied, under our legislation, it does not therefore matter whether the order sought to be varied was a consent order or not. See also the cases of *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232. (emphasis added)

[19] Therefore, the assertion made by the petitioner wife that a consent order is immune to variation was found to be untenable and unacceptable.

Whether Material Change In Circumstances Had Been Established

[20] The central issue before this court in this application centred on establishing whether a material change in circumstances, as defined in s. 96 of the Law Reform (Marriage and Divorce) Act, had indeed taken place. This provision reads:

> Section 96 – Power for court to vary orders for custody or maintenance
>
> The court may at any time and from time to time **vary, or may rescind**, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any **material change in the circumstances**. (emphasis added)

[21] The words "material change" has been emphasised in the case of *Sivajothi K Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318; [2006] 3 MLJ 184 to mean not simply any change, as the operative word is 'material'.

[22] The phrase 'material change in circumstances' was explained by George Seah SCJ in the Supreme Court case of *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 CLJ 202; [1986] CLJ (Rep) 133; [1986] 2 MLJ 297, in the following passage:

> In our opinion, when an application is made to the court to vary an existing order for maintenance, **the proper approach is to start from the original order and see what changes financial or otherwise**, have taken place since that date including any changes which the court is required to have regard to under s. 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible. (emphasis added)

[23] Further elaboration of 'material change in circumstances' may be found in *Lim Hong Bee v. Mah Teck Oon* [2010] 8 CLJ 473; [2010] MLJU 264, where it was stated by Suraya Othman J (as she then was) that "the change in question must be material and not any change. It means a change in a crucial and vital part. In considering whether there has been any "material change" within the meaning of this section, all the relevant circumstances must be taken into account."

[24] Hence, in examining the question of material change in circumstances, the inquiry is not simply whether there has been any material change *per se* since the *decree nisi*. The change must be sufficiently material, such that expecting the *status quo* to remain would not be justified.

[25] It was also crucial to note that the question of whether there was a material change in circumstances is a question of fact, as decided in the High Court case of *Anna Tay Siew Hong v. Joseph Ng Tiong Yong* [1995] 3 CLJ 717; [1995] MLJU 257. Reference was made also to the case of *Navarajan*

Subramaniam v. Rajeswary Muniandy [2019] 1 LNS 1014; [2019] MLJU 715, where it was stated by Hayatul Akmal Abdul Aziz J, in the following passage:

> The legal definition of material change in circumstances is not cast in stone. It is ultimately **dependent upon the facts and circumstances of each** case. No one case is like the other. (emphasis added)

[26] The petitioner husband, therefore, had the legal burden to prove the material change of circumstances on a balance of probabilities. *YCC v. LSY* [2007] 7 CLJ 207; *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371.

[27] In the present case, the central argument put forth by the petitioner husband in this application revolved around the claim that the petitioner wife had denied his access to the children. Such denial was based on the petitioner wife's assertion that the petitioner husband had failed to meet his child maintenance obligations.

[28] The first point to note was that the term in the *decree nisi* regarding access was a general term which read:

> ...
>
> (b) Pempetisyen Suami **akan diberi akses munasabah** kepada anak-anak tersebut
>
> ... (emphasis added)

[29] Such a term in the *decree nisi* allowed the parties the flexibility to mutually determine what would be reasonable regarding the time and place for visitation. Nevertheless, it was an undeniable fact that the petitioner wife unilaterally decided to deny the petitioner husband access, citing her claim that he owed her outstanding child maintenance payments as the basis for her actions.

[30] The petitioner wife relied on the High Court case of *Geh Thuan Hooi v. Serene Lim Paik Yan* [2009] 1 LNS 1682 to argue that if there was in fact non-compliance by the petitioner wife, the petitioner husband was at liberty to initiate enforcement proceedings against the petitioner wife, namely committal proceedings, instead of filing an application to vary.

[31] I had to disagree with the petitioner wife on this point as the facts of the case of *Geh Thuan Hooi v. Serene Lim Paik Yan* are different from the facts of this present case, where in the present case, there was consistent denial by the petitioner wife of the petitioner husband's access to the children, which she claimed was justified because of non-payment of child maintenance. In any event, in the case of *Navarajan Subramaniam v. Rajeswary Muniandy* [2019] 1 LNS 1014, Hayatul Akmal Abdul Aziz J had allowed a variation application by the applicant husband, based on the denial of access by the

respondent wife. As such, it was not unprecedented to conclude that a spouse's conduct in failing to comply with the terms of a court order, could, in certain circumstances amount to a material change in circumstances.

[32] At this juncture, allow me to emphasise unequivocally that access to a child should never under any circumstances, be tied to the payment of child maintenance. While both parents have a responsibility to financially support their children, access to a child is a fundamental right that must never be employed as a bargaining chip or leverage in any situation.

[33] The petitioner wife should be reminded of the crucial role that the petitioner husband, as a father, plays in fostering a nurturing environment for his children. This significance was notably underscored in the Singapore case of *APE v. APF* [2015] SGHC 17, where Tan Siong Thye J referred to the article *Contact and Domestic Violence – The Experts' Court Report* [2000] Fam Law 615 by Claire, Sturge and Danya Glaser. This expert report illuminated the essential contribution a father can make to his child's life, underscoring the pivotal role a father plays in promoting his child's well-being and development.

[34] Reference was made also to the case of *Chow Sook Pheng v. Wong Maun Hoong* [2011] 1 LNS 260, which illuminated the importance of preserving the bond between a father and a child. In that case, the court recognised that a child's welfare and holistic development are enhanced when they maintain a meaningful relationship with their father. Consequently, denying a child the chance to establish and nurture this relationship can have detrimental effects on their emotional and psychological well-being, as elucidated in the subsequent passage:

> In my opinion, *it is for the welfare and in the best interests of the children that they spend as much time as possible with not only their mother but also their father*. Just because the parents' marriage has broken down, it does not mean that the 3 children should be alienated from either parent. I believe a child would develop better if he or she spends as much time as possible with both parents. What if, at the end of the case, the Respondent Husband is given custody of the 3 children? *By then the damage would have been caused if, in the interim, the Respondent Husband was denied of access to the 3 children resulting in their estrangement and discomfort with each other. This would not be for the welfare of the children*. (emphasis added)

[35] In fact, it was my view that access should be unequivocally recognised as an inherent right belonging to the child, rather than a privilege granted to the parent. Consequently, the petitioner wife had, in no uncertain terms, violated the fundamental rights of the children by denying the petitioner husband's access to their children. Her conduct was inexcusable, as she had, for over six long years, manipulated and weaponised the children to her

advantage, denying the petitioner husband access to them. In my view, the petitioner wife's conduct, therefore, in consistently denying the petitioner husband access to the children amounted to material change in circumstances.

[36] If the petitioner wife alleged that the petitioner husband had failed to fulfil his child maintenance obligations, she had every legal avenue at her disposal to address this issue. She indeed had chosen to pursue this by initiating bankruptcy proceedings against the petitioner husband in December 2021 under Bankruptcy No BA-29NCC-2576-12/2021. The actions that the petitioner wife had already taken against the petitioner husband only served to reinforce my view that she had no right to deny the petitioner husband access to the children.

[37] Indeed, during the hearing of this application, the petitioner wife had sought the court's intervention in enforcing child maintenance payments from the petitioner husband. In my view, it was important to underscore that this application was initiated by the petitioner husband, and consequently, the petitioner wife, therefore, was not in a position to make any demands.

[38] The petitioner husband had also sought to vary the terms of the *decree nisi* pertaining to child maintenance. The impetus behind such variation was rooted in the petitioner wife's own admission. She stated that she would not require maintenance as long as the petitioner husband relinquished his access to the children. The petitioner husband relied on s. 83 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 83 – Power for court to vary orders for maintenance
>
> The court may at any time and from time to time **vary**, or rescind, **any subsisting order for maintenance**, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact **or where there has been any material change in the circumstances**. (emphasis added)

[39] I found the petitioner husband's argument regarding the variation of terms pertaining to child maintenance to be untenable, as it did not constitute material change in circumstances. In my view, the petitioner husband was attempting to evade his maintenance obligations by exploiting the messages exchanged with the petitioner wife. It was clear that the petitioner wife's willingness to forgo child maintenance was contingent upon the petitioner husband relinquishing his right of access to the children. Nonetheless, the petitioner husband was endeavouring to evade his responsibility to provide child maintenance payments, while simultaneously insisting on his right to have access to the children.

[40] Even if it were true that the petitioner husband had failed to meet his child maintenance responsibilities, the petitioner wife had the legal means to address this matter through the appropriate channels, as she had indeed done. Notably, the petitioner husband had himself acknowledged that he had filed this application to vary child maintenance terms due to the bankruptcy proceedings initiated by the petitioner wife.

[41] In any event, this court was not the appropriate forum for addressing bankruptcy proceedings, as such proceedings cannot be the basis for arguing a substantial change in circumstances to warrant varying terms pertaining to child maintenance.

[42] Consequently, the prayer to vary the terms of maintenance was not allowed.

Conclusion

[43] In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, both oral and documentary, and submissions of both parties, this application was allowed only with regard to the petitioner husband's access to the children, where the terms of such access were varied from 'reasonable access' to more specific terms as follows:

(i) the petitioner husband shall have access to the children every Saturday from 9am to 9pm;

(ii) the petitioner husband shall have access to the children for half of all public holidays (which includes but is not limited to the school holidays);

(iii) the petitioner husband's access to the children shall not be confined to the residence of the petitioner wife, and the petitioner husband is at liberty to take the children out of the petitioner wife's residence;

(iv) the petitioner husband's access to the children shall not be denied by the petitioner wife under any circumstances whatsoever;

(v) the petitioner husband's access to the children shall be granted without prejudice to any change to the date and time that may be agreed upon in writing between the parties; and

(vi) the petitioner wife is allowed to take the children overseas subject to providing the petitioner husband ten days' notice of such travel, together with its travel itinerary.